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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 19

ALFRED S. PENN,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,
Respondent.

Petition for Rehearing.

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PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

Now comes Chicago and North Western Railway Company, respondent herein, by its attorneys and presents herewith its petition for rehearing in this cause.

On respondent's appeal to the Circuit Court of Appeals in the above case, two grounds of error were urged:

(1) That the court erred in refusing to grant defendant's motion to instruct the jury to find defendant not guilty; and

(2) That the court erred in giving to the jury plaintiff's instruction E.

Proper objections to the giving of instruction E were made by counsel for respondent on the ground that the instruction ignored the question of whether the slack was in or out when the uncoupling was attempted (Rec. 155). In the Circuit Court of Appeals the parties each argued this point with the authorities relied on, but the Court of Appeals found it unnecessary to pass on the propriety of the instruction because of the conclusion it reached on the merits of the case.

On appeal in this court, counsel for petitioner did not ask the court to pass on the validity of the objections to instruction E, and the only reference to instructions made in the briefs of the parties filed herein appears in the reply brief of petitioner, where reference is made on page 7 thereof to *instruction C.* It is instruction E to which we objected in the Circuit Court of Appeals and not instruction C. Since counsel for petitioner did not ask this court to pass on our objection to instruction E, we likewise refrained from arguing the point, and did so on the basis of *Aetna Casualty & Surety Co.* v. *Flowers,* 330 U. S. 464. In that case respondent sued to recover death benefits under the Workmen's Compensation Law of Tennessee. Petitioner removed the suit from the Tennessee state court to the United States District Court on the ground of diversity of citizenship. The district court dismissed the action for want of proper venue. The Circuit Court of Appeals held that the requisite jurisdictional amount was not involved and directed that the case be remanded to the state court. The Supreme Court of the United States granted certiorari. This court held that the Circuit Court of Appeals erred in concluding that the requisite jurisdictional amount was not involved. Respondent then

sought to support the action of the Circuit Court of Appeals on other grounds. The Supreme Court held that while respondent had a right so to do, the questions had not been passed on by the Circuit Court of Appeals, nor had they adequately been presented in the Supreme Court. Accordingly, this court remanded to the Circuit Court of Appeals so that the additional questions could there be considered.

We submit that the *Flowers* case is squarely in point and that this court should remand to the Circuit Court of Appeals so that the question of error in plaintiff's instruction E may be considered by that court.

Respectfully submitted,

LOWELL HASTINGS,
DRENNAN J. SLATER,
Attorneys for Respondent.